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Supreme Court of the United States

MILVERTHA PINNICK, GUARDIAN AND NEXT FRIEND OF MANNA PINNICK AND CORTLAND PINNICK, MINORS, AND JAMES BRADY, ADMINISTRATOR OF THE ESTATE OF MELISSA PINNICK, DECEASED, PETITIONERS

v.

CORBOY & DEMETRIO, P.C., A PROFESSIONAL CORPORATION, ROBERT J. BINGLE AND G. GRANT DIXON, III, INDIVIDUALLY AND AS AGENTS OF CORBOY & DEMETRIO, P.C.,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are appellants in the Illinois appellate courts denied due process where one or more appellate judges hearing their appeal receive substantial contributions for their election campaigns directly from----and have close personal ties with----the opposing party, the appellee?

2. Do members of the Illinois judiciary who hear an appeal involving a party who makes substantial contributions to their election campaign----and with whom they have close personal ties----lose, or appear to lose, their ability to decide the appeal fairly and impartially so that recusal is required as a matter of due process?

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The unpublished and unreported Order of the Illinois Supreme Court in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 107359), filed and decided on December 22, 2008, denying petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and dismissing as moot petitioners' Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional, is set forth in the Appendix hereto(App. 1-2).

The unpublished Motion by petitioners for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional in *Milvertha Pinnick et al. v. Corboy & Demetrio, P.C. et al.* (Docket No. 107359), filed in the Illinois Supreme Court on November 24, 2008, is set forth in the Appendix hereto(App. 3-13).

JURISDICTION

The decision of the Supreme Court of Illinois, the highest State court in Illinois in which a decision could be had, denying petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and dismissing as moot petitioners' Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional, was decided and filed on December 22, 2008(App. 1-2).

This petition for writ of certiorari is filed within ninety (90) days of the date of the decision of the highest State court of Illinois in which a decision could be had on petitioners' motions, motions which specially claimed a right to due process under the federal Constitution, all consistent with the language of 28 U.S.C. § 1257(a).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or

authority exercised under, the United States.

28 U.S.C. § 455:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of a disputed evidentiary facts concerning the proceeding;
> >
> > ....
> >
> > (4) He knows that he, individually or as a fiduciary...has a financial interest in the subject matter in controversy or in a partyto the proceeding, or any other interest that could be substantially affected by the outcome....;
>
> ....
>
> (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in the household.
> (d) For the purposes of this section, the following words or phrases shall have the meaning indicated:
>
> > (1) "proceeding" includes ... appellate review" ...;
> >
> > ....
> >
> > (4) "financial interest" means ownership of a legal or equitable interest, however small....

28 U.S.C. § 1291:

> The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States....

Illinois State Constitution, Article VI, § 3:

> SUPREME COURT—ORGANIZATION
> The Supreme Court shall consist of seven judges. Three shall be selected from the First Judicial District, and one from each of the other Judicial Districts. Four Judges constitute a quorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years.

Illinois State Constitution, Article VI, § 16:

> ADMINISTRATION
> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff, who shall serve at its pleasure, to assist the Chief Justice in its duties. The Supreme Court may assign a Judge temporarily to any court and an Associate Judge to serve temporarily as an Associate Judge on any Circuit Court. The Supreme Court shall provide by rule for expeditious and inexpensive appeals.

Illinois Supreme Court Rule 63(C):

> *Disqualification.*
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> ....
> (d) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse...or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than *de minimis* interest that could be substantially affected by the proceeding; or
> (e) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
> ...
> (iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding....

Illinois Code of Civil Procedure 735 ILCS 5/2-1001:

> **Sec. 2-1001. Substitution of judge.**
>
> (a) A substitution of a judge in any civil action may be had in the following situations:
> ....

(3) Substitution fo cause. When cause exists.

...

(iii) Upon the filing of a petition for substitution of judge for cause a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition. The judge named in the petition need not certify but may submit an affidavit if the judge wishes. If the petition Is allowed, the case shall be assigned to a judge not named in the petition. If the petition is denied, the case shall be assigned back to a judge named in the petition.

Illinois Senate Joint Resolution Constitutional Amendment 10 (SJRCA10):

[proposing the following language as subsection (b) to Article VI, § 3]

(b) If a Supreme Court Judge recuses himself or herself in a particular case or matter before the Court because of an actual or potential conflict of interest, then the Judge shall notify the Clerk of the Supreme Court in writing of the recusal. A Judge of the Appellate Court shall then be selected to serve as an Interim Supreme Court Judge to hear that particular or matter until it is resolved or otherwise disposed of by the Court. The Interim Supreme Court Judge shall be selected in a random manner from a pool of Appellate Judges as determined by Supreme Court Rule.

STATEMENT

In August of 1995, Johnny Waites rented a 1994 Mitsubishi *Diamante* station wagon from McFrugal Auto Rental in Atlanta, Georgia. The next day, Ms. Constance McNair and Ms. Melissa Pinnick ("Melissa"), cousins and both mothers, drove the vehicle from Atlanta to Joliet, Illinois, to visit members of their family. With them on the trip were four children including two of Melissa's young children, a daughter Manna, one and one-half years old, ("Manna") and a son Cortland, then six years of age ("Cortland") ("petitioners").

During the trip to Illinois, Melissa encountered trouble with the *Diamante* and she phoned Waites to tell him that the automobile was stalling and could only be restarted after several attempts. After arriving in Joliet, Melissa's father unsuccessfully attempted to determine the cause of the stalling problem or to have McFrugal replace the vehicle while in Joliet.

On August 17, 1995, Melissa and her cousin together with their children headed back to Atlanta in the *Diamante*. McNair was driving the vehicle and Melissa was in the front passenger seat with their children located in the backseat. At about 2:30 A.M., McNair was driving southbound on Interstate 65 in Indiana when she heard a noise, felt the left tire "shift" and then lost control of the car. According to McNair, the vehicle completely shut down—the car's lights went out and the brakes and steering did not work. The *Diamante* slid across the road out of control, then through the median separating the southbound from the northbound lanes of the Interstate and came to rest

in the passing lane of the northbound traffic lanes.

Without lights and with doors which would not unlock, frantically McNair tried unsuccessfully to restart the car. As she did so, a northbound Cadillac driven by James Dinsmore struck the disabled *Diamante*. The collision killed Melissa and critically injured her two children. Manna sustained a spinal cord injury and Cortland suffered traumatic psychological injuries, still endured today, as the result of waking up in the crushed automobile to see his deceased mother's head facing backwards.

In the aftermath of the accident, Melissa's father, Robert Pinnick, contacted an attorney and family friend, Vincent Cornelius, who recommended that the respondent Corboy & Demetrio, P.C.("the Firm") represent the Pinnick family. On August 30, 1995, Cornelius contacted the respondent Robert Bingle, Esq., the Firm's managing partner("Bingle"). Cornelius told Bingle that the *Diamante*'s owner, McFrugal Auto Rental in Atlanta, Georgia, was attempting to retrieve the damaged car which was being stored in an auto pound in Indiana.

On September 1, 1995, Bingle met with Robert Pinnick and Cornelius and told both of them that the Firm would obtain a court order to preserve the automobile in its present state (for the purpose of forensic analysis) and that he would have someone from the Firm investigate the vehicle. The Firm through Bingle then agreed to take the case; Pinnick executed three retainer agreements as the personal representative of the petitioner Estate of Melissa Pinnick and the next friend of both children Manna

Pinnick and Cortland Pinnick("petitioners").

On the facts as he knew them, Bingle apprehended the potential for several causes of action on behalf of petitioners: (1) an action against McFrugal Auto Rental in Atlanta for its negligent maintenance of the *Diamante*; (2) an action against both McNair and James Dinsmore for the negligent operation of their respective vehicles; (3) a product liability suit against Goodyear, the tire manufacturer, for any discovered defects in the tire(s) which may have contributed to the accident; and (4) a product liability suit against the *Diamante's* manufacturer Mitsubishi for any defects eventually discovered in the automobile itself.

Following the meeting, Bingle telephoned investigative firm Spahn-Breckinridge to find and photograph the *Diamante*. The *Diamante* was located that afternoon and the following day, Saturday, September 2, 1995, its private investigator (Edmund Rooney) ordered the police report of the accident and visited Highland Towing in Highland, Indiana where he photographed the wrecked *Diamante* and left his business card with instructions to contact him if anyone sought to remove the vehicle. In the meantime, Bingle dictated a memo to the case file that the Firm needed "to check out whether or not we need to get a protective order on the vehicle," that the Firm "need[s] to follow up on this end of aspect [*sic*] of the case immediately," and that the Firm "may need to file a lawsuit in order to get a protective order."

Bingle opted to enjoy the Labor Day weekend without obtaining the protective order and assigned the case to respondent G. Grant Dixon, III, Esq., ("Dixon"),

an associate at the Firm. Dixon's "to do" list included obtaining a protective order prohibiting anyone, including McFrugal Auto Rental, Mitsubishi or Goodyear, from removing, altering or in any way changing the physical state of the *Diamante* pending its examination by the Firm's experts in order to determine the cause of the accident. By September 12, 1995, investigator Edmund Rooney filed his report of the accident together with photographs he took of the *Diamante*. Rooney noted that there were defects in the automobile's flat right rear tire and that these defects were probably *not* caused by the impact of the collision.

Thereafter, the respondents never obtained the protective order to preserve the *Daimante* and, obviously without the vehicle, failed to engage a forensic auto or tire expert to add to Rooney's rudimentary investigation, analyze the vehicle and determine with scientific probability the cause of the accident. Without a protective order in place, McFrugal, on September 27, 1995, took possession of the vehicle from Highland Towing in Indiana. Thereafter, the vehicle was never located, although a salvage title was issued by the State of Florida in late January of 1996.

Compounding this careless lack of oversight by respondents concerning the whereabouts of the *Diamante* during this crucial period in September, Bingle in September or October lied to Cornelius, the Pinnick's family attorney, telling him that the vehicle actually had been "checked out and that there was no issue with the vehicle." As part of this subterfuge, Bingle denied Cornelius' offer to take over the case, preventing Cornelius from examining file documents

showing none of respondents had secured the automobile or obtained an expert forensic analysis of the *Diamante* or its tires before it was taken by McFrugal and then destroyed. Bingle's lie that the vehicle had "checked out" was made while simultaneously respondent Dixon had his investigative firm scouring Illinois Mitsubishi dealerships for the *Diamante* or a replacement, a search which continued until the Circuit Court dismissed the case three years later.

On November 29, 1995, the Firm's Dixon on behalf of petitioners filed suit in the federal district court for the Northern District of Indiana against James Dinsmore based upon his negligent operation of his vehicle. The suit proceeded for three years until on December 9, 1998, the district judge dismissed petitioners' complaint as a sanction for the Firm's "lengthy pattern of discovery abuses" and its failure to abide by the trial judge's discovery orders.

In the wake of this dismissal in federal court, petitioners sued respondents Corboy & Demetrio, P.C., Bingle and Dixon in the Circuit Court of Cook County, Illinois, for spoliation of evidence under Count I; legal malpractice under Counts II through V; and for fraudulent concealment under Count VI in lying and failing "to inform [the petitioners] that they had neglected to perform an investigation of the car or its tires for the purpose of pursuing claims against Mitsubishi, Goodyear or McFrugal."

The State trial court entered summary judgment against petitioners on Count I's spoliation claim because it ruled, after melding the spoliation count into

the product liability counts, Counts III-V, there was no duty to secure and on all the legal malpractice claims except Count II for lack of proof. It dismissed Count VI's fraudulent concealment claim because it could not be proven independent of any legal malpractice claim. As for Count II, the legal malpractice claim stemming from the dismissal of petitioners' claims against Dinsmore in the Indiana federal district court on account of the Firm's discovery abuses, the Firm at trial admitted liability. However, the trial court granted respondents' motion to cap its liability under this count at $100,000, Dinsmore's limits of coverage on his automobile policy. On February 12, 2007, a judgment was entered consistent therewith.

Upon petitioners' appeal from these rulings, the Appellate Court for the First Judicial District of Illinois issued its modified order on October 20, 2008, affirming all of the trial court's ruling with minor revisions(App.). Pursuant to Illinois Supreme Court Rule 315, petitioners instituted a Petition for Leave to Appeal to the Supreme Court of Illinois, challenging each and every ruling of the Illinois intermediate appellate court(App. 3-4).

Incident thereto, on November 24, 2008, petitioners moved for the recusal of four (4) of the seven (7) Illinois Supreme Court Justices pursuant to Supreme Court Rule 63(C) and for the appointment of temporary Justices for those who recuse themselves(App. 3-13). Specifically, petitioners claimed that respondent Firm is "the most recognized and renowned plaintiffs' product liability law firm not only in Chicago and Illinois, but throughout the country"(App. 4).

More important, petitioners alleged that the Firm through its attorneys, its experts and its witnesses has exercised pervasive personal and professional influence over the Supreme Court of Illinois by establishing a close, confidential relationship with at least four (4) of the Justices of the Supreme Court(App. 4-5). It has done so by making substantial election campaign contributions-----clearly more than the *de minimis* amount requiring disqualification under Illinois Supreme Court Rule 63(C)(1)(d) and (e)(iii)----- to some of its Justices:

> Specifically, Chief Justice Thomas R. Fitzgerald has received in excess of $52,000 from [respondent] Bingle and [respondent] Corboy & Demetrio's partners, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio; Justice Charles E. Freeman has received $5,000 from [respondents] Bingle and Corboy partner Philip Corboy, Jr.; Justice Robert Thomas has received in excess of $16,000 from [respondents] Bingle and the Corboy partners; and while Justice Ann M. Burke has personally received contributions of only $1,500, her husband, Edward M. Burke, has received in excess of $24,000 from [respondents] Corboy partners Thomas Demetrio and Philip Corboy.

(App. 5-6).

In addition, petitioners contended that the Firm's legal experts Robert Clifford of the Clifford Law Offices and Joseph Power of Power Rogers & Smith, P.C., "have contributed substantial amounts to the abovementioned Justices including $25,000 to

Justice Charles E. Freeman and $17,000 to Justice Robert Thomas"(App. 6).Besides these campaign contributions, petitioners alleged that Justice Robert Thomas recently received $7,000,000 in a defamation lawsuit where he was represented by the Firm's legal expert Joseph Power of Power Rogers & Smith, P.C.(*Id.*).

Petitioners concluded that all of these campaign contributions by respondents, well in excess of $100,000 and sometimes approaching 20% of the total contributions received by a given Justice, together with Justice Thomas' close relationship with the Firm's legal expert Joseph Power of Power Rogers & Smith, P.C., prevent these four Justices from fairly and impartially hearing this appeal(App. 7-8). They accordingly sought their recusal "from hearing any arguments or rendering any decision in this matter including, but not limited to, ruling on [their] Petition for Leave to Appeal and [their] appeal to the Illinois Supreme Court if Leave to Appeal is allowed"(App. 8).

Petitioners argued that the risk that these campaign contributions will compromise the four Justices' ability to fairly or impartially hear this appeal, or have caused their fairness and impartiality to be reasonably questioned in the circumstances, is even more compelling than the risk of bias or prejudgment considered by this Court in the pending case of *Hugh M. Caperton et al. v. A.T. Massey Coal Company, Inc. et al.*, U.S. Supreme Court Docket No. 08-22(App. 7-8).

While the campaign contribution in *Caperton* represented 60% of the appellate judge's total contributions, *only one* appellate judge was affected by

the contributions in that case and there were four (4) other appellate judges who could minimize the taint of prejudice(App. 8). Here, on the other hand, campaign contributions have compromised the ability of *four* of the seven (7) Justices of the Illinois Supreme Court to fairly and impartially consider petitioners' Petition for Leave to Appeal(*Id.*). The resulting imbedded bias of four sitting Justices renders it impossible that petitioners can ever collect the four votes necessary to have their petition for Leave to Appeal granted(*Id.*).

Moreover, in *Caperton*, the campaign contributions were not made by the party itself but rather by its major shareholder and one of its officers(App. 7). Here, however, respondent Corboy & Demetrio, P.C., itself together with respondents Bingle and Dixon as well as its legal experts have *directly* contributed to the four Justices' election campaigns or allied themselves *directly* with these Justices so that their ability to fairly and impartially decide this appeal has been compromised or appears to have been compromised(App. 7-8).

Finally, petitioners asked the Illinois Supreme Court to reconsider its previous decisions holding that it was incapable of appointing or designating temporary substitute Justices to replace any Justice who could not hear an appeal because of a disqualification(App. 9-11). As petitioners argued, if this failure to appoint substitute Justices results in a lack of a quorum to even consider a petition for Leave to Appeal under the Illinois Supreme Court Rules, thus preventing any relief whatsoever for petitioners in a case like this, the resulting lack of an appellate remedy violates the due process clause of the fourteenth amendment to the

federal constitution "and must be found unconstitutional"(App. 11).

On December 22, 2008, the Supreme Court of Illinois denied the petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and dismissed as moot the petitioners' Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional(App. 1-2). With none of its member Justices having recused himself or herself, the Illinois Supreme Court has yet to rule on petitioners' Petition for Leave to Appeal.

On February 3, 2009, following the Illinois Supreme Court's denial of petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C), the Illinois State Senate's Executive Committee recommended to the Executive Subcommittee on Constitutional Amendments an amendment to the Illinois Constitution Art. VI, § 3, which would allow for temporary appointments to the Illinois Supreme Court when a sitting justice recuses him or herself because of an actual or perceived conflict of interest. The recused justice would be replaced by a judge of the appellate court selected in a random manner to be determined by Supreme Court Rule.

This petition for a writ of certiorari to the Illinois Supreme Court followed.

REASONS FOR GRANTING THE PETITION

The Illinois State Appellate Proceedings Deny Petitioners Due Process of Law Because They Allow Participation By Appellate Judges Who Receive Substantial Campaign Contributions Directly From the Opposing Party, Circumstances Which Prove The Objective Probability of Actual Bias Or Provide the Basis Upon Which The Judges' Impartiality Might Reasonably Be Questioned.

A. The Illinois Supreme Court's Order Denying Recusal By Four of Its Justices Is a Final "Judgment or Decree" by the Highest State Court Which Draws Into Question A Right Claimed Under the Constitution And Its Propriety Is Within The Jurisdiction Of This Court To Review By Writ of Certiorari Pursuant to 28 U.S.C. § 1257(a).

The relevant statute, 28 U.S.C. § 1257(a), limits this Court's review to "[f]inal judgments or decrees" of the highest State court from which a decision can be had which implicates a right claimed under the federal constitution. *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 54(1989). To possess the requisite degree of finality for review by this Court, a state-court judgment or decree must be final in two senses: (1) it must be subject to no further review or correction in any other state tribunal; and (2) it must be an effective determination of the litigation and not merely interlocutory or intermediate steps of the litigation. See *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 82-83 (1997); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-482(1975).

The decisions of this Court over the years have adopted a flexible, pragmatic approach to the requirement of finality of the state-court judgment or decree sought to be reviewed, especially when "there are further proceedings in the...state courts yet to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 477. See also *Construction Laborers v. Curry*, 371 U.S. 542, 549(1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558(1963). These and other cases look beyond the fact that further state-court proceedings are contemplated and instead measure finality by reference to the likely impact of further proceedings on that ruling or on the federal policies at stake. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 379 n.11(1988).

As this Court has observed, in deciding questions of finality, the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511(1950) quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148,152-153(1964).

Emerging from this decisional law are four distinct rationales, any one of which justifies the conclusion that the Illinois Supreme Court's order denying petitioners' motion for recusal by four of its Justices from hearing petitioners' appeal is a final "judgment or decree" within the jurisdiction of this Court to review by writ of certiorari pursuant to 28 U.S.C. § 1257(a). They are:

(a) while there may be further State proceedings in the event the Illinois Supreme court eventually grants petitioners' Petition for Leave to Appeal, the order here *conclusively* determines petitioners' federal due process rights in the State court proceeding, leaving any further proceedings in State court irretrievably tainted by the constitutional defect of a lack of due process in these proceedings. Thus regardless of how the Illinois Supreme court ultimately rules on petitioners' Petition for Leave to Appeal or even if it reaches the substantive merits of their appeal, the case is for all practical purposes concluded and the judgment by the Illinois Supreme Court should be deemed final for purposes of 28 U.S.C. §1257(a). *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306-307(1989). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479. *Mills v. Alabama*, 384 U.S. 214, 217-218(1966);

(b) regardless of the outcome of any future proceedings in the Illinois Supreme Court, its resolution of the federal due process question as the highest State court survives as an important federal question on its own, requiring a timely decision by this Court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 480-481. *Brady v. Maryland*, 373 U.S. 83, 85 n.1(1963). *Radio Station WOW v. Johnson*, 326 U.S. 120, 124-127(1945). That is, the Illinois Supreme Court's determination that four of its seven members are able to hear petitioners' appeal fairly and impartially even though they have accepted substantial campaign contributions from----and have close personal relationships with---- petitioners' adversaries is a question considered separate and apart from any subsequent proceedings in State court, so much so that the federal issue is unaffected and undiluted by the

later State court proceedings. Thus for all practical purposes, the ruling on the federal issue is a final judgment or decree by the highest State court under 28 U.S.C. §1257(a). *Id.* See also *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 278 n.7(1980);

(c) this is among the small class of cases "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied immediate review by the Court and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Construction Laborers v. Curry*, 371 U.S. at 548-549 quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546(1949)(giving the analogous finality requirements of 28 U.S.C. § 1291 "a practical rather than a technical construction."). *Accord*, *National Socialist Party v. Skokie*, 432 U.S. 43, 44(1977). Petitioners' right to a fair and impartial appellate tribunal----a core right to due process in the State appellate forum----is too important to be denied immediate vindication in the Supreme Court and too independent of the cause itself to require that all appellate proceedings be exhausted before this Court's review is undertaken; or

(d) this is a case where the subsequent State proceedings *would themselves* deny the federal right for the vindication of which review is sought in the Supreme Court. *Chapman v. California*, 405 U.S. 1020, 1022(1972)(Douglas, J., dissenting) citing *Colombo v. New York*, 405 U.S. 9, 10-11(1972) and *Harris v. Washington*, 404 U.S. 55, 56(1971). See *Helstoski v. Meanor*, 442 U.S. 500, 506(1979). For the Illinois Supreme Court to proceed to consider petitioners' Petition for Leave to Appeal or the merits of the appeal itself with the participation of four Justices who have

accepted substantial campaign contributions from---- and have close personal relationships with---- petitioners' adversaries denies petitioners' their right to due process in the form of a fair and impartial appellate tribunal, renders the Illinois appellate proceedings a sham, and reinforces the unconstitutional taint *already* present in these State court proceedings.

In the final analysis, petitioners' right to an appellate tribunal which is unbound from the substantial campaign contributions from, and close personal relationships with, one of the parties before it and the partiality and bias which attends such personal relationships and financial support "presents a serious and unsettled question," *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 547, which is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377(1945). Moreover, the question of whether these four Justices should recuse themselves is "independent of, and unaffected by" further State court proceedings. *Radio Station WOW v. Johnson*, 326 U.S. at 126. Nor will further State court proceedings moot this important federal question and the crucial federal right at risk in these proceedings. *Brady v. Maryland*, 373 U.S. at 85 n.1. *Construction Laborers v. Curry*, 371 U.S. at 549. In these circumstances, this Court has jurisdiction under 28 U.S.C. § 1257(a), to review by writ of certiorari the Illinois Supreme Court's order denying recusal.

B. The Due Process Deprivation.

More so than *Caperton*, this petition raises fundamental issues of due process: (1) can an appellant receive a fair hearing on appeal where *four* members of

the appellate tribunal receive significant campaign contributions *directly* from----and have close personal ties with---the opposing party, the appellee?; and (2) in these circumstances, have these four affected Justices objectively lost, or have they appeared to lose, their ability to decide petitioners' appeal fairly and impartially so that recusal is warranted as a matter of due process?

Due process requires a neutral and detached judge both at the trial and appellate level. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533(2004) quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972). *Withrow v. Larkin*, 421 U.S. 35, 46-47(1975). *In re Murchison*, 349 U.S. 133, 136 (1955). While the trial judge is more than a mere umpire----in fact, he is the governor of the proceedings before him----he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party. *Quercia v. United States*, 289 U.S. 466, 470(1933). Nor "should [he] give vent to personal spleen or respond to a personal grievance." *Offutt v. United States*, 348 U.S. 11, 14(1954). See 28 U.S.C. §§ 455(a) and (b)(1).

In order to safeguard the constitutional right to an impartial judge, "our system of laws has always endeavored to prevent even the probability of unfairness." *In re Murchison, supra.* Thus recusal is warranted where there is proof that a judge is actually biased or where an objective inquiry establishes the probability of bias on the judge's part. *Withrow v. Larkin*, 421 U.S. at 47. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825(1986). *Tumey v. Ohio*, 273 U.S. 510, 532(1927). This objective standard avoids requiring a litigant to prove bias or prejudgment by positive proof,

an almost impossible burden by any measure. See, e.g., *Crawford v. United States*, 212 U.S. 183, 196(1909)("Bias...might exist in the mind of one...who was quite positive he had no bias."). Thus where even the appearance of bias is serious enough to create a probability that the judge is actually biased against a litigant, due process requires recusal. *Withrow v. Larkin, supra. In re Murchison, supra.*

This constitutional standard for recusal, i.e., that recusal is required as a matter of due process only when the appearance of partiality is serious enough to generate an objective "probability of actual bias," *Withrow v. Larkin, supra,* has been supplemented by a more stringent non-constitutional standard expressed in federal law and various state and federal judicial codes, i.e., that recusal is mandated where a judge's "impartiality might reasonably be questioned."See 28 U.S.C. §§ 455(a); Illinois Supreme Court Rule 63(C)(1)(" A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...."); ABA Model Code of Judicial Conduct R. 2.11 (A)(2007)(same).

The questions presented by this petition are:(1) whether the ability of the four Justices here to rule fairly and impartially on petitioners' appeal is compromised by their close personal and professional relationships with and their acceptance of direct, substantial contributions to their election campaigns or to their spouses from the parties opposing petitioners' appeal; (2) whether their close personal and professional relationships with and receipt of these substantial contributions directly from a party appearing before it is sufficient to prove an objective

probability of actual bias as a constitutional matter; (3) whether it provides a sufficient basis for reasonably questioning their impartiality under both state and federal judicial codes; and (4) whether this latter, non-constitutional standard should now be "constitutionalized" by this Court so that where circumstances are present from which reasonable persons can reasonably question a judge's impartiality, recusal is warranted as a matter of due process and fundamental fairness. Petitioners submit that each of these questions should be answered in the affirmative.

In the first place, the Court made clear in both *Tumey v. Ohio*, 273 U.S. at 532, and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825(1986), that the ability of the judicial officers there to rule fairly and impartially on the issues before them was fatally compromised by the *possibility* of a financial interest in the outcome of the cases before them. *Id.* In *Lavoie*, the Court determined that it was a violation of due process for a State supreme court justice to participate in the court's review of a verdict of bad-faith refusal to pay an insurance claim because the justice was pursuing his own bad-faith suit against *another insurance company* and the outcome of the case before the court *might* have had a direct effect on the outcome of the justice's case. 475 U.S. at 825. The Court noted that the "possible temptation" suggested by these attenuated facts was enough to conclude that a probability of bias existed sufficient to constitutionally impugn the proceedings. *Id.*

A fortiori, members of the Supreme Court of Illinois, charged by statute and by the State constitution with correcting errors in the trial and

intermediate appellate court, who have close personal and professional relationships with and receive direct, substantial financial contributions for their election campaigns or for their spouses from the actual parties appearing before them on appeal face more than the "possible temptation" of having these factors sway their disposition. The facts here are more compelling than the attenuated interest of the supreme court justice in *Lavoie*; they show an objective probability of actual bias by four of the Justices in favor of their friends and close associates, the respondents who made these substantial contributions and against the petitioners on this appeal.

The respondents and their legal experts have given at least $115,750 to three of the Justices' political committees—$52,500 for Chief Justice Fitzgerald, $33,250 for Justice Thomas, $30,000 for Justice Freeman----as well as $26,500 to Justice Burke and her husband, City of Chicago alderman Edward Burke who is also Chairman of the Cook County Democratic Party's judicial slating committee. He presides over and greatly influences the individuals nominated in Cook County for judicial slating (Chief Justice Fitzgerald, Justice Burke and Justice Freeman are all slated and elected from Cook County).

In addition, the respondent Firm's partners maintain a broad range of personal and professional relationships with members of the State judiciary. The Firm's partners and the Justices of the Supreme Court are frequent invitees at each other's social and professional gatherings and the Firm's partners have served numerous terms as president of various bar associations including the Illinois State Bar Association,

the Chicago Bar Association and the Illinois Trial Lawyers Association as well as presiding over county and state judicial selection and qualification committees.

In this environment, the Justices' receipt of substantial financial contributions directly from a party appearing before it----a party who enjoys an ongoing personal and professional relationship with these same Justices----is sufficient to prove an objective probability of actual bias warranting their recusal as a constitutional matter. These same facts provide a sufficient basis for reasonably questioning their impartiality under both state and federal judicial codes. Recusal was therefore warranted as a matter of due process and fair procedure. *Withrow v. Larkin, supra. In re Murchison, supra.*

Finally, this latter, more stringent standard, i.e., that recusal is mandated whenever a judge's "impartiality might reasonably be questioned," should be made a constitutional standard framed by rudimentary due process requirements. When an appellate justice is asked to recuse him or herself, a fair hearing, *not* by the challenged judge, but by an impartial tribunal must be held such that if reasonable persons could reasonably question a judge's impartiality in the circumstances, recusal is objectively determined as a matter of due process and fundamental fairness instead of merely being based upon the recusal candidate's subjective opinion. This independent judicial determination already exists when a substitution of a trial judge for cause is requested pursuant to Illinois Code of Civil Procedure 735 ILCS 5/2-1001(a)(3)(iii), which requires a determination by a

judge other than the one being substituted..

The unmonitored act of assessing dispassionately the worth of an appellate argument can be compromised by financial considerations affecting the Justice's own personal situation. *Aetna Life Insurance Co. v. Lavoie, supra.* Any judge, including an appellate judge, must be scrupulous both to avoid losing his partiality and to maintain his unfamiliarity with disputed matters which may come before him. *In re Murchison*, 349 U.S. at 138. See *Quercia*, 289 U.S. at 470. Thus the new rule should be that an appellate judge as a matter of constitutional law should disqualify himself in a proceeding in which there is shown an objective "probability of actual bias" or where his partiality might reasonably be questioned, including, but not limited to, instances where he has a close personal or professional relationship or a direct, personal or financial connection to a party appearing before him or in the outcome of the appeal.

An appellate judge's refusal to recuse himself in the circumstances here----for whatever reason or rationale---cannot comport with due process. The impropriety of the Justices' refusal to recuse themselves below is exacerbated by their failure to provide any reasons or rationale for their decisions(App. 1-2). By their nature, most recusal motions must rely solely on public facts available about a particular judge. The Justices' refusal to address these public facts with any particularity in their rulings, especially the nature of the respondents' substantial, direct contributions to their respective election campaigns contributes to the public's belief that campaign contributions influence judge's decisions

and its erosion of trust in the judiciary caused by the exorbitant campaign expenditures incurred in state judicial elections. See *Republican Party v. White*, 536 U.S. 765, 790 (2002)(O'Connor, J., concurring).

Indeed, recent research by political scientists at the University of Pittsburgh and Utah State University shows that there is a strong correlation between campaign contributions and decisions by the State Supreme Court judges in states that elect those judges, especially in states where judges are elected in partisan contests (e.g., Michigan and Texas) as opposed to being listed on a nonpartisan ballot (e.g., Nevada). In an environment where numerous attorneys and law firms make campaign contributions, the study found that judges notice those who contribute relatively large sums of money so that when liberal attorneys contribute more money to a judge's election campaign, the likelihood of a liberal decision increases; the same is true for contributions made by conservative attorneys; and the contribution advantage does not have to be that high for the likelihood of victory to increase significantly.

Thus contributions to an appellate judge's election campaign inevitably influence his or her decisionmaking process and a rule which disqualifies a judge in a proceeding in which there is an objective "probability of actual bias" because of such contributions or where his partiality might reasonably be questioned on the same ground, including instances where he has a close personal or professional relationship with a party appearing before him, guarantees a fair hearing and due process.

C. The Failure of the Illinois Constitutional Scheme To Provide For Temporary or Replacement Judges Denies the Petitioners Due Process.

If petitioners' motion for recusal of the four Justices of the Illinois Supreme Court had been successful, the Court would have lacked a quorum under Article VI, § 3, of the Illinois Constitution to conduct any further review of this case and because a clear majority of four votes out of seven is necessary to grant petitioners' Petition for Leave to appeal, it would have lacked the power to grant the petitioners' Petition for Leave to Appeal, leaving intact the ruling of the intermediate appellate court and leaving petitioners with no remedy at the highest appellate level in the State.

The solution for this lack of a quorum and lack of a majority would be for the Supreme Court to appoint replacement judges from the other appellate courts in the State to sit for those judges who have recused themselves. However, because the State Supreme Court has twice ruled that it does not have the power under Article VI, § 16, of the Illinois Constitution to appoint replacement judges when recusal takes place, see *PHL, Inc. v. Pullman Bank & Trust Company et al.*, 721 N.E.2d 1119, 1120(Ill. 1999); *Perlman v. First Nat. Bank of Chicago*, 331 N.E.2d 65, 65(Ill.1975), there is no effective remedy in the State constitutional scheme to cure this lack of a quorum or of a majority in the Supreme Court, leaving petitioners permanently without an effective or fair appellate remedy in the State's highest Court.

This incomplete State constitutional scheme for appointing temporary or replacement judges in the event that a Justice of the Supreme Court recuses himself or herself does not pass muster under the federal due process clause applicable to Illinois via the fourteenth amendment and without such substitute Justices, petitioners have been and will be denied a fair hearing on their claims. The Illinois Supreme Court's cramped conception of its own power to appoint replacement judges when recusal occurs does not cure but compounds this constitutional impropriety.

Once it is determined that the Due Process Clause applies to the State court proceedings, "the question remains what process is due." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541(1985) quoting *Morrissey v. Brewer*, 408 U.S. 471, 481(1972). The Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004).

Employing the *Mathews* calculus to the circumstances here in order to balance the petitioners' legitimate private interest in having a meaningful

appellate remedy even if four of the Justices of the Supreme Court recuse themselves against the judicial system's need for efficient administration, the petitioners submit that the process due them consists of the following, as represented by legislation presently being considered by the Illinois General Assembly to amend Article VI, § 3, of the Illinois Constitution:

> (b) If a Supreme Court Judge recuses himself or herself in a particular case or matter before the Court because of an actual or potential conflict of interest, then the Judge shall notify the Clerk of the Supreme Court in writing of the recusal. A Judge of the Appellate Court shall then be selected to serve as an Interim Supreme Court Judge to hear that particular or matter until it is resolved or otherwise disposed of by the Court. The Interim Supreme Court Judge shall be selected in a random manner from a pool of Appellate Judges as determined by Supreme Court Rule.

(Senate Constitutional Amendment SJRCA10). Petitioners submit that this the process that is due them under the federal constitution.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the Order of the Supreme Court of Illinois denying recusal and, ultimately, to vacate the Order and remand the matter to the Illinois Supreme Court for reconsideration in light of this Court's anticipated decision in *Hugh M. Caperton et al. v. A.T. Massey Coal Company, Inc. et*

al., U.S. Supreme Court Docket No. 08-22; or the Court should decide that as a matter of due process these four Justices were required to recuse themselves from this proceeding once it was shown that the close personal relationships with and substantial contributions to their election campaigns or to their spouses by one of the parties appearing before them created an objective probability that each of these Justices was biased in favor of that party and against petitioners or because these circumstances created a factual backdrop against which their impartiality might reasonably be questioned; and declare that the Illinois Supreme Court's practice of refusing to appoint replacement judges for Justices who recuse themselves denies petitioners due process of law; or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)
Filed 12/22/08

No. 107359
IN THE SUPREME COURT OF ILLINOIS

MILVERTHA. PINNICK, et al., Petitioners,
v.
CORBOY & DEMETRIO, P.C., et al., Respondents.

Appeal from Appellate Court, First District 1-07-0533
Circuit Court Cook County No. 03 L 8525

ORDER

This cause, coming to be heard on the motion of the petitioners for recusal of certain Supreme Court Justices pursuant to Supreme Court Rule 63(C), and to find limitations of appointment of temporary Justices to the Illinois Supreme Court unconstitutional, due notice having been given to respondents, and the court being fully advised in the premises.

Recusal

Because disqualification is a decision that rests exclusively within the determination of the individual judge per Rule 63, each justice named in the recusal portion of the motion has considered the matter and the following represents the decision of each individual justice:

Chief Justice Fitzgerald denies that portion of the motion requesting that he recuse himself from hearing any argument, or rendering any decision in this matter

including, but not limited to, a decision on the pending petition for leave to appeal;

Justice Freeman denies that portion of the motion requesting that he recuse himself from hearing any argument or rendering any decision in this matter including, but not limited to, a decision on the pending petition, for leave to appeal;

Justice Thomas denies that portion of the motion requesting that he recuse himself from hearing any argument or rendering any decision in this matter including, but not limited to, a decision on the pending petition for leave to appeal; and

Justice Burke denies that portion of the motion requesting that she recuse herself from hearing any argument or rendering any decision in this matter including, but not limited to, a decision on the pending petition for leave to appeal.

Limitations on Appointment of Temporary Justices

Because no individual justice has disqualified himself or herself from participating in this matter, the Court dismisses as moot that portion of the petitioners' motion to find limitations of appointment of temporary Justices to the Illinois Supreme Court unconstitutional.

11/24/08
No.107359

IN THE SUPREME COURT OF ILLINOIS

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and James Brady, Administrator of the ESTATE OF MELISSA PINNICK, deceased,
Plaintiffs-Petitioners,

vs.

CORBOY & DEMETRIO, P.C., a Professional Corporation, ROBERT J. BINGLE, individually and as Agent of Corboy & Demetrio, P.C., and G. GRANT DIXON, III, Individually and as Agent of Corboy & Demetrio, P.C., Defendants-Respondents.

Appeal No: 1-07-533 from the Circuit Court of Cook County, Illinois No. 03 L 8525

Hon. William D. Maddux, Hon. Daniel M. Locallo, Judges Presiding

PLAINTIFFS-PETITIONERS' MOTION FOR RECUSAL OF SUPREME COURT JUSTICES PURSUANT TO SUPREME COURT RULE 63(C) AND MOTION TO FIND LIMITATIONS OF APPOINTMENT OF TEMPORARY JUSTICES TO THE ILLINOIS SUPREME COURT UNCONSTITUTIONAL

NOW COMES Plaintiffs-Petitioners ("Plaintiffs"), MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK, a minor, CORTLAND PINNICK and JAMES BRADY, administrator of the estate of

MELISSA PINNICK, deceased, by their attorney, CHARLES A. BOYLE & ASSOCIATES and respectfully move that certain Justices of this Court recuse themselves pursuant to Supreme Court Rule 63(C) and request that this Honorable Court exercise the authority to appoint temporary Justices to replace those Justices who have recused themselves.

INTRODUCTION

This legal malpractice case also alleges fraud and involves the law firm of Carboy & Demetrio, the most recognized and renowned plaintiffs' product liability law firm not only in Chicago and Illinois, but throughout the country, and two of its attorneys, managing partner Robert J. Bingle and former associate G. Grant Dixon III (collectively, "Defendants"). On October 10, 2008, Plaintiffs filed a Motion For Extension Of Time To File Petition For Leave To Appeal pending the Appellate Court's Modified Rule 23 Order. On October 20, 2008, the Appellate Court for the First District, First Division in Appeal No. 1-07-533 issued its Modified Rule 23 Order affirming the Circuit Court of Cook County. The Supreme Court allowed Plaintiffs' Motion for Extension of Time on October 21, 2008, granting Plaintiffs until November 24, 2008, to file their Petition for Leave to Appeal. Concurrently with this Motion, Plaintiffs have timely filed their Petition for Leave to Appeal pursuant to Supreme Court Rule 315(a).

Pursuant to Supreme Court Rule 63(C) and as a result of the plentiful personal and professional influence exerted by Defendants on the Illinois judiciary, particularly judicial elections, several Justices should

recuse themselves from deliberating on Plaintiffs' Petition for Leave to Appeal. This stems from the close and confidential relationships between Defendants and several Justices, Defendants' frequent invitations to Justices to participate in social gatherings[1], home and office visits and substantial financial contributions made by Defendants, their partners, associates, employees, and their legal experts to the campaigns of several Justices and their spouses. Plaintiffs respectfully request that this is an appropriate time for this Honorable Court to reconsider its prior holding in PHL, Inc. v. Pullman Bank & Trust Co., 86100, 721 N.E.2d 1119 (1999), as unconstitutional under the Due Process Clause of the XIV Amendment to the Constitution of the United States and appoint temporary justices to sit in the recused Justices stead.

I. It is improper for the Honorable Chief Justice Thomas R. Fitzgerald, the Honorable Justice Charles E. Freeman, the Honorable Justice Robert R. Thomas and the Honorable Justice Anne M. Burke to hear this matter as all Justices or their spouses have received campaign contributions well in excess of $10,000 from Defendants or Defendants' counsel, experts and witnesses.

Pursuant to Supreme Court Rule 63(C), a judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. Several Justices currently seated on the Court have received substantial contributions from Defendants or their trial counsel, their experts and their witnesses. These contributions are substantially more than the de mininius interest requiring disqualification pursuant to Rule 63(C)(i)(d),(e)(iii). Specifically, Chief Justice

Thomas R. Fitzgerald has received in excess of $52,000[2] from Defendant Bingle and Defendant Corboy & Demetrio's partners, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio; Justice Charles E. Freeman has received $5,000 from Defendant Bingle and Corboy partner Philip Corboy, Jr.; Justice Robert Thomas has received in excess of $16,000 from Defendant Bingle and the Corboy partners; and while Justice Anne M. Burke has personally received contributions of only $1,500, her husband, Edward M. Burke has received in excess of $24,000 from Corboy partners Thomas Demetrio and Philip Corboy. In addition to these amounts, Defendant's legal experts Robert Clifford of the Clifford Law Offices and Joseph Power of Power Rogers & Smith, P.C. have contributed substantial amounts to the abovementioned Justices including $25,000 to Justice Charles E. Freeman and $17,000 to Justice Robert Thomas.[3]

In addition to the contributions received by the Justices, Justice Robert Thomas recently was awarded $7,000,000 in a defamation lawsuit in which he was represented by Defendants' legal expert Joseph Power of Power Rogers & Smith, P.C. and Justice Thomas Kilbride, who does not appear to have received direct campaign contributions from Defendants, has recently recused himself from several appeals involving product liability due to his pending case involving a bicycle injury. The underlying cases are product liability.

The issue of when campaign contributions raise an issue of bias regarding the judiciary's legitimacy and efficacy which affects the public's confidence in the fairness and fidelity of the law is an issue of first impression for the

Illinois Supreme Court. Currently, as reported on November 17, 2008, this exact issue is pending before the United States Supreme Court in the case Caperton v. Massey Coal Co., No. 08-22. Caperton, certiorari granted on appeal from the West Virginia Supreme Court, involves one West Virginia Supreme Court Justice who was the swing vote in reversing a large jury award against a defendant whose officer and shareholder was a substantial contributor to the Justices' campaign.

The United States Supreme Court has repeatedly referenced the importance of the public's confidence in the fidelity of the law. See, e.g. Alden v. Maine, 527 U.S. 706, 752 (1999) (a state court's "legitimacy derives from fidelity to the law"); Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); Valley Forge Christian College v. Americans United far Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("public confidence [is] essential" to the judicial branch) (quoting United States v. Richardson, 418 U.S. 166,188 (1974)(Powell, J., concurring).

Although the percentages contributed by Defendants are significantly less than the 60% claimed in Caperton, the facts underlying the contributions in the instant case are even more compelling to require the recusal of Justice Burke, Justice Roberts, Justice Freeman and Chief Justice Fitzgerald. In Caperton, the contributions were not made directly by the defendant, Massey Coal Co., but rather by a major shareholder and officer of the defendant. In the instant case, the contributions were made directly by Defendants. Furthermore, in

Caperton only one justice of the West Virginia Supreme Court was alleged to have received substantial contributions from the defendant's officer. Thus, the plaintiffs had the ability to win the support of three of the remaining four West Virginia Supreme Court Justices and succeed in their suit. In the instant suit four of the seven Illinois Supreme Court Justices have received contributions or have other relations with Defendants and their experts. Thus, unlike Caperton where, irrespective of the bias of the Chief Justice, the plaintiffs retained a 75% chance of succeeding in their appeal, in the instant suit, to have their Petition for Leave to Appeal granted Plaintiffs must receive four votes, an impossibility with the imbedded bias of four sitting Justices. See Ill. Const. art. VI, § 3.

The substantial financial contributions, well in excess of $100,000 and occasionally approaching 20% of the total contributions, made by Defendants and Justice Thomas' relationship with Defendant's expert, Joseph Power, present grave issues regarding the Justices ability to render an impartial decision in this matter.

With the appearance of impartiality, Plaintiffs respectfully petition Justice Anne M. Burke, Chief Justice Thomas R. Fitzgerald, Justice Charles E. Freeman and Justice Robert R. Thomas to recuse themselves from hearing any arguments or rendering any decision in this matter including, but not limited to, ruling on Plaintiffs' Petition for Leave to Appeal and Plaintiffs' Appeal to the Illinois Supreme Court if Leave to Appeal is allowed.

II. The Supreme Court must reconsider its previous holdings finding itself incapable of appointing or designating by lottery temporary substitute Justices to replace Justices who have recused themselves.

Supreme Court vacancies, although infrequent, do occur and are routinely filled with exceptional lawyers and judges of integrity and intellect. Most recently, Justice Anne Burke was appointed by the Court to fill the unexpired term of the retiring Justice Mary Ann McMorrow. It is respectfully suggested that the Court consider a fair and impartial mechanism to make appointments preserving the seven member panel for its critical consideration of petitioners Petition for Leave to Appeal.

The Supreme Court has twice been asked to interpret Article VI, § 16 of the Illinois Constitution of 1970. In both Perlman v. First Nat'l Bank of Chicago, 60 Ill.2d 529 (1975), and PHL, Inc. v. Pullman Bank & Trust Co., 86100, 721 N.E.2d 1119 (Ill.1999), this Honorable Court has held that it may not temporarily appoint replacement Justices for the Supreme Court when Justices are required to recuse themselves from considering a case. In his dissent in Perlman, Chief Justice Underwood deliberated over several scenarios which might be rectified if the Supreme Court were to interpret Article VI, § 16 to empower the Supreme Court to appoint temporary replacements when the Supreme Court is incapable of reaching the required four votes. Perlman, 60 Ill. 2d at 530. Plaintiffs deplore the forfeiture of just one recusal without replacement and the obvious inequity and injustice it creates.[4]

A scenario much more compelling than those contemplated by the former Chief Justice is presented here. In § I of this motion Plaintiffs have identified four Justices who received substantial campaign contributions from Defendants and their counsel, experts and witnesses and have been represented by Defendants' experts. The recusal of these Justices results in only three Justices competent to consider Plaintiffs' Petition for Leave to Appeal. Unlike Perlman and PHL, where at least four Justices remained to satisfy the requirements of Article VI, § 3 of the Constitution, in this case even if all non-recused Justices vote to grant Plaintiffs' Petition for Leave to Appeal, Plaintiffs would not obtain the required four votes. This is not only an absurd result, but also a violation of Plaintiffs' Due Process rights under the XIV Amendment of the United States Constitution.

The XIV Amendment of the United States Constitution mandates that individuals receive Due Process rights in dealing with states, The United States Supreme Court has held that a fair trial in a fair tribunal is a basic requirement of due process and that fairness requires an absence of actual bias in the trial of cases. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623 (1955). In re Murchison, although referring to a criminal trial proceeding, further held, "every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." Id.

The holding of In re Murchison is relevant to the instant matter. If required to obtain the necessary four votes with less than seven sitting Justices, not only will

Plaintiffs face a drastic diminution of the odds, but will tragically receive no due process when four Justices elect to recuse themselves in compliance with Illinois Supreme Court Rule 63(C). The paradox is exacerbated without the requisite panel of seven; because the individual Justices' abstentions effectively bar Plaintiffs a fair and equitable hearing on their rightful and legitimate Petition for Leave to Appeal.

The present interpretation of Article VI of the Illinois Constitution of 1970 by this Court violates the Due Process clause of the XIV Amendment of the United States Constitution and must be found unconstitutional. Defendants' campaign contributions to the four named Justices effectively purchase Defendants a victory in the Illinois Supreme Court. Four recusals are tantamount to four votes for Defendants. This Court must demonstrate its independence by revisiting its previous decisions as opined in the concurring and dissenting opinions of Perlman and PHL or find that either Article VI, § 3 requiring a quorum and vote of four Justices or Article VI, § 16, limiting the Supreme Court's ability to replace recused Justices, is unconstitutional under the Due Process Clause of the XIV Amendment to the United States Constitution.

We respectfully suggest the court implements the procedure for appointment of Justices upon the resignation or death as most recently employed in the appointment of Justice Anne Burke to replace Justice Mary Ann McMorrow.

WHEREFORE, Plaintiffs respectfully request that pursuant to Supreme Court Rule 63(C), all Justices who have received campaign contributions from Defendants

or their counsel, legal experts or witnesses recuse themselves from deliberating in this matter and that this Honorable Court reconsider its opinions in Perlman and PHL and find that the Illinois Supreme Court has the authority under Article VI, §§ 3, 16 of the Illinois Constitution of 1970 to replace Justices for whom recusal is necessary with suitable temporary appointments in order to guarantee all parties before this Court Equal Protection of the laws and Due Process by having a full seven Justice panel consider Plaintiffs' Petition for Leave and all other matters in the instant appeal.

Footnote

[1]Mr. Corboy, as special counsel to the Illinois Democratic Party, has for years hosted parties to which several members of the Illinois Supreme Court are frequent invitees.

[2]The dollar amount of campaign contributions is derived solely from contributions from Philip Corboy, Philip Corboy, Jr., Tom Demetrio, Michael Demetrio, Robert J. Bingle, Robert Clifford and Joseph Power.

[3]Plaintiffs' counsel, Charles A. "Pat" Boyle, acknowledges he has made contributions to several of the above mentioned Justices, typically $500 or less for benefit dinners and similar fundraising events.

[4]A quorum of less than seven Justices is inequitable. The percentage of the quorum needed to achieve the mandatory four votes granting a Petition for Leave to Appeal disproportionately diminishes when Justices

recuse themselves without appointment of temporary Justices.

> Four mandatory votes out of seven Justices: 57% of the quorum required.
> Four mandatory votes out of six Justices: 67% of the quorum required.
> Four mandatory votes out of five Justices: 80% of the quorum required.
> Four mandatory votes out of four Justices: 100% of the quorum required.
> Any number of justices less than four would render an impossibility of granting motions.

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No. 08-1129

IN THE

Supreme Court of the United States

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and JAMES BRADY, Administrator of the Estate of MELISSA PINNICK, Deceased,

Petitioners,

v.

CORBOY & DEMETRIO P.C., a Professional Corporation, ROBERT J. BINGLE, Individually and as an agent of Corboy & Demetrio P.C., and G. GRANT DIXON, III, Individually and as an agent of Corboy & Demetrio P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This petition involves the denial of a motion to recuse four (of seven) State Supreme Court justices from considering a petition for leave to appeal from an adverse appellate court decision. The motion lacked factual support, failed to demonstrate any actual bias, and its claim of an appearance of bias was based upon non-extraordinary contributions made by certain partners at the respondent law firm to those justices' campaign committees many years before the case was presented to that Court. Under those circumstances, is there no due process violation in the denial of the motion to recuse?

RULE 29.6 STATEMENT

Corboy & Demetrio P.C. is a private, Illinois professional corporation. All other respondents are individuals.

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Respondents, pursuant to this Court's April 28, 2009 Order, respectfully submit this brief in opposition to Petitioners' Petition for a Writ of Certiorari to review the order of the Illinois Supreme Court denying recusal of certain judges.

Petitioners (plaintiffs below) lost an appeal from a legal malpractice case against these respondents-defendants. Plaintiffs sought the Illinois Supreme Court's discretionary review by filing a petition for leave to appeal from the Appellate Court's unpublished order. Concurrently with that petition, they filed a motion to recuse four of the seven sitting Supreme Court Justices. Relying on contributions made by certain partners of the respondent law firm of $250 to, at most, $11,500 (and the vast majority ranging from $250 to $2,500) to those judges' campaign committees years (some nearly a decade) before the petition was filed, plaintiffs contended that the appearance of bias required recusal. The motion to recuse was denied and this Petition followed.

OPINIONS BELOW

Petitioners are not directly challenging the merits of the underlying judgment or the Illinois Appellate Court decision in this petition. Instead, petitioners are challenging the Illinois Supreme Court's December 22, 2008 order denying recusal of four justices. That order also dismissed, as moot, petitioners' motion to find limitations of appointment of temporary justices to the Illinois Supreme Court unconstitutional.

STATEMENT OF THE CASE AND MISSTATEMENT OF FACT OR LAW IN PETITION

Much of the factual recitation in the Petition is devoted to "facts" regarding the merits of the legal malpractice suit against respondents. While respondents take issue with many of these "facts," the merits of the underlying case are not at issue in this Petition. The only legal issue at stake pertains to the denial of recusal of four Justices of the Illinois Supreme Court based upon campaign contributions or other claims of bias. Accordingly, because many of the misstatements do not "bear[] on what issues properly would be before the Court if certiorari were granted" (Supreme Court Rule 15.2), respondents have not undertaken to correct every specific misstatement of fact or law.

Background Information

In 2003, Plaintiffs filed suit against these defendants arising out of the defendants' representation of the plaintiffs in an underlying automobile negligence action against James Dinsmore. Plaintiffs obtained a judgment on one of five counts in the Complaint. Although plaintiffs had secured a judgment, they appealed from adverse rulings, including the dismissal of or summary judgment on the other counts of the complaint and a ruling limiting their recovery to $100,000.

On June 30, 2008, the Appellate Court issued an unpublished order, which affirmed the trial court judgment. Under Illinois Supreme Court Rule 23,

published opinions are limited to cases where either "(1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." Ill. Supreme Court Rule 23(a). Decisions not satisfying those criteria are issued as unpublished orders. An unpublished order is not precedential and may not be cited by other parties in Illinois courts. Ill. Supreme Court Rule 23(e).

Plaintiffs sought rehearing of that decision or, alternatively, a certificate of importance allowing them to appeal to the Illinois Supreme Court. The Appellate Court denied plaintiffs' requested relief but issued a modified decision on October 20, 2008.

Plaintiffs filed a petition for leave to appeal to the Illinois Supreme Court on November 24, 2008. In Illinois, the Supreme Court has jurisdiction to allow discretionary appeals to its court in cases like this. *See* Ill. Const. of 1970, Art. 6, § 4; Illinois Supreme Court Rule 315. The petition is submitted to the court who must decide by a quorum (four justices) to grant leave to appeal. If review is granted, then the case is briefed and the court decides the case on the merits. Leave to appeal is granted in only a small percentage of the civil appeals for which leave to appeal is sought.[1]

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[1] According to the 2007 Caseload and Statistical Records available on the Illinois Supreme Court website, from 2003 through 2007 a total of 3,189 petitions for leave to appeal and/or appeal as a matter of right were filed and a total of 248 were allowed, which is 7.7%.

When plaintiffs filed their petition for leave to appeal, they also filed a motion to recuse four of the seven presiding Supreme Court Justices from considering the petition. (Appendix to Petition for Writ of Certiorari ["App."] 3a). The motion attached a six-paragraph affidavit of plaintiffs' counsel but no other documents or evidence. The motion asserted that these four justices should be recused because of contributions made to each of these justices' campaign committees by Corboy & Demetrio partners Robert Bingle, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio.[2] The motion further asserted that there was a close relationship between Phillip Corboy and several Justices due to Mr. Corboy's role as special counsel to the Illinois Democratic Party.[3] The motion also asserted that bias might be based on certain contributions by attorneys Joseph Power and Robert Clifford. Power and Clifford are Illinois attorneys who had been deposed as expert witnesses for the defendants during the malpractice suit below. The motion also asserted that Joseph Power had acted as counsel for Justice Thomas in a recent suit.

The Appellate Court decision, which plaintiffs were seeking leave to appeal, did not mention either Clifford or Power by name. The petition for leave to appeal also did not name Robert Clifford or Joseph Power. These

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[2] These are the attorneys that plaintiffs noted they were basing their motion on so we have limited our analysis herein to these attorneys as well.

[3] In reality, Corboy's position as counsel ended years ago. He was general counsel to the Illinois Democratic Party from April, 1990 to November, 1994.

experts' opinions, discovered below, did not form the basis of the circuit court's rulings for defendants or the Appellate Court's affirmance. Except for the fact that plaintiffs raised these names within the motion to recuse, the text of the documents submitted would not have alerted the Justices considering the petition for leave to appeal that either Mr. Clifford or Mr. Power had been involved in the case below.

Facts Regarding Contributions

As to the facts regarding the campaign contributions, as set forth below, respondents contend that the plaintiffs' motion to recuse was deficient by failing to set forth sufficient or clear facts as to what they were basing their motion on. The affidavit attached to the motion stated that the facts were obtained from the Illinois State Board of Elections ("ISBE") website.[4] The respondents have reviewed the ISBE website and the semiannual and final reports that would have been available on that website through November 2008 (when the motion to recuse was filed). The amounts that we glean match the numbers suggested by plaintiffs and the facts are summarized here. We found 30 contributions (by the partners identified by plaintiffs) ranging from $250 to one $10,000 donation and one $11,500 donation. 23 of the 30 contributions ranged from $250 to $2,500. Except for Justice Burke, each of the elections for which contributions were made took place in 2000, long before the 2003 suit was filed or the case

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[4] The website can be found at http://www.elections.state.il.us or http://www.elections.il.gov.

worked its way up to the Illinois Supreme Court in 2008. Burke's uncontested election took place in 2008.

Further details regarding the contributions to each of the Justices at issue are listed below. None of these Justices acted as either a campaign chairman or a treasurer for his or her committee. Indeed, Illinois Supreme Court Rule 67 (B)(2) provides that "a (judicial) candidate shall not personally solicit or accept campaign contributions."

Justice Fitzgerald

From a period of January 1, 1999 through December 31, 2000, the Citizens Committee to Elect Thomas R. Fitzgerald received contributions of $890,840. Of that amount during that time, the site shows that the relevant Corboy & Demetrio partners contributed a total of $52,750 or about 5.9%. The site shows that petitioners' counsel, Boyle, contributed $650 to Fitzgerald during the same period.

Justice Freeman

In 1990 Freeman was elected to the Illinois Supreme Court. The contributions in 1999 and 2000 were related to his 2000 retention contest. The website reports contributions made from July 1, 1999 to December 31, 2000 to Freeman's campaign committee of a total of $216,575 but only the 7/1/100-to-12/31/00 semiannual report itemizes contributions. It shows that of the $154,650 in individual contributions during that time frame, a total of $5,000 (or about 3%) came from the partners plaintiffs identified at the defendant firm.

Justice Thomas

Thomas was elected in 2000. From July 1, 1999 to December 31, 2000, Thomas received $566,470 with $16,000 or about 2.8% being contributed by the identified partners of the defendant firm. Plaintiffs' counsel, Boyle, contributed $250 to Thomas during this time.

Justice Burke

Burke was appointed to the Supreme Court in 2006 and ran for election in 2008. From January 1, 2007 to December 31, 2007, she received $1,601,320 from hundreds of contributors. Plaintiffs state that contributions by the defendant firm s partners totaled $1,500. That is less than one percent. Burke's election was uncontested and many of the contributions were ultimately returned to the contributors.

Plaintiffs also include information regarding contributions (totaling $24,000) made to Justice Burke's husband, Alderman Edward Burke. Plaintiffs do not suggest that any of the monies contributed to Edward Burke were somehow used for Justice Anne Burke's campaign.

General Information Regarding Contributions

Except for Justice Burke, the contributions at issue took place in 1999 and 2000. (For Justice Burke, the contributions took place in 2007 but amount to less than 1% of her contributions.) The Pinnick lawsuit was filed in the circuit court in 2003 – three years after most of

these contributions were made. It was appealed in 2007 – almost eight years after most of these contributions. The petition for leave to appeal was filed in November 2008 – nearly a decade after many of the contributions.

Illinois Law Regarding Election of Judges

Like 38 other states which provide for election of some or all judges,[5] in Illinois, State Supreme Court Justices may be elected and individuals may contribute to their political campaigns. Indeed, the Illinois constitution has allowed for public election of judges for over 150 years. *See* Ill. Const. of 1848, art. V, § 3; Ill. Const. of 1870, Art. VI, § 10.

ARGUMENT AND REASONS FOR DENYING THE PETITION

The petition should be denied because it seeks review of an order denying a procedurally flawed motion, which was properly denied on its face; it presents legal issues that are not unsettled or in conflict with any other decision; and it involves an order that was properly denied on substantive grounds. Pursuant to United States Supreme Court Rule 10, a petition for writ of certiorari "will be granted only for compelling reasons."

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[5] According to an *amicus curiae* brief filed by the Conference of Chief Justices in *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, currently 39 states allow for election of judges. 2009 WL 45973, *11 (U.S.). And, "all but a handful of States hold popular elections to choose at least *some* judges to *some* benches at *some* stage of a judge's career." 2009 WL 45973, *5 (U.S.). The same brief states that, nationwide, 60% of all appellate judges face a contestable election. *Id.* at *6, n.11.

The character of reasons that this Court considers include whether a state court has decided an important federal question "in a way that conflicts with" another state high court or federal appellate court opinion or whether a state court "has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." *Id.* This case does not meet any of these criteria. It is not compelling. It presents no reason justifying use of this Court's resources.

A. The Order on Review Properly Denied a Motion Which Was Procedurally Flawed and Substantively Inadequate; Thus, There is No Compelling Reason to Consider Discretionary Review of That Order

Petitioners sought discretionary review in the Illinois Supreme Court of an Illinois Appellate Court order affirming the judgment from which they sought review. On November 24, 2008, petitioners filed a motion for recusal of four of the seven Illinois Supreme Court Justices pursuant to Illinois Supreme Court Rule 63(C) and for appointment of temporary Justices for those who recused themselves. (App. 3). As a review of that motion shows, the motion was inadequate, on its face, because it was comprised of primarily conjecture and surmise with virtually no facts or evidence to support the petitioners' contentions. As to those facts that were included within the motion, it lacked evidentiary or documentary support. Even if the facts recited were considered, they were inadequate on their face to merit the relief sought. Accordingly, the motion had to be and was properly denied and there is no basis to seek review of it.

1. The Motion at Issue Was Procedurally Flawed

Procedurally, Illinois Supreme Court Rule 361 governs "Motions in Reviewing Court." It provides that, where a record has not been filed, a movant must file with the motion an appropriate supporting record pursuant to Rule 328. Petitioners' motion lacked a supporting record or sufficient documentary support. Instead, the motion simply made statements, apparently based upon counsel's personal beliefs, with no support. The only attachment to the motion was the six-paragraph affidavit of plaintiffs' counsel which, other than background, stated only the following:

> 4. The facts contained in *Plaintiffs-Petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C)* and *Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional* regarding campaign contributions made to Supreme Court Justices or their spouses were obtained from the Illinois State Board of Elections website at http://www.elections.il.gov.
>
> 5. Specific dollar amounts of contributions listed in Plaintiffs' Motion were obtained for each Justice from the Justices or Justices' spouses D-2 campaign disclosures available on the Illinois State Board of Election website.

> 6. I affirm that all facts contained within *Plaintiffs-Petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C)* and *Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional* are true and correct to the best of my knowledge.

Regarding the campaign contributions, petitioners' counsel stated only that he obtained the information from the ISBE website and the D-2 campaign disclosures available on the site. Plaintiffs' counsel did not state, however, the specific dates he was using, did not attach the actual D-2 disclosures and did not attach any documentation from the website. We are left to examine the website ourselves and guess at whether we are using the same specific information. For other "facts," there is no support whatsoever. For example, petitioners claimed, without any evidentiary support, that the defendants had made "frequent invitations to Justices to participate in social gatherings. . . ." (App. 5a). Petitioners' only "support" for that statement is a footnote in the motion which states that "Mr. Corboy, as special counsel to the Illinois Democratic Party, has for years hosted parties to which several members of the Illinois Supreme Court are frequent invitees." (App.12a). There is no support provided for that footnote (and, as shown in note 3, *supra*, Mr. Corboy has not been special counsel for 15 years).

Neither the court nor the opposing party should be left to rule on or respond to a motion which is utterly

lacking in documentation, proof or context. On its face, the motion failed to meet the minimum prerequisites for consideration as a valid motion.

2. The Motion Was Substantively Without Merit

Even assuming the accuracy of the "facts" recited in petitioners' motion, they did not support a finding for recusal. Petitioners filed their motion "[p]ursuant to Supreme Court Rule 63(C)" (App.4a), but they failed to present facts or argument supporting a finding of partiality under that rule. Rule 63(C) is Canon 3, entitled "A Judge Should Perform the Duties of Judicial Office Impartially and Diligently." Section C, governing disqualification, provides in pertinent part as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts . . .;
>
> (b) the judge served as a lawyer in the matter . . .;

(c) the judge was . . . associated in the private practice of law with any law firm . . . currently representing any party . . .;

(d) the judge knows that he or she . . . or the judge's spouse . . . has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimus interest that could be substantially affected by the proceeding; or

(e) the judge or the judge's spouse . . . :

(i) is a party to the proceeding;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than *de minimus* interest that could be substantially affected by the proceeding; or

> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Illinois Supreme Court Rule 63.

Thus, Rule 63 governs disqualification where the judge is actually partial or personally biased in some significant way. Petitioners' motion did not present an argument of such actual partiality or bias. The motion did not recite facts falling within any of the categories listed in subsections (a) through (e). Instead, the motion argued the "appearance of impartiality. . . ." (App. 8a).

In their petition in this court, petitioners argue that recusal is warranted where there is "proof that a judge is actually biased or where an objective inquiry establishes the probability of bias on the judge's part." (Petition, p.22). They also contend that recusal is required where "the appearance of bias is serious enough to create a probability that the judge is actually biased. . . ." (Petition, p.23). Thus, petitioners essentially concede that something more than a mere appearance of impartiality is required to trigger recusal. Plaintiffs' motion relied on a mere appearance of impartiality. Accordingly, the motion was properly denied because it failed on its merits.

The present case is quite different from the facts in *Caperton, infra.* The contributions at issue here took place many years before the case was presented to the Illinois Supreme Court. The contributions did not involve the multi-million dollar amounts at issue in

Caperton. Under any applicable standard, the non-extraordinary, past contributions at issue in this case did not require recusal and did not trigger due process concerns.

B. The Petition Fails to Illustrate a Conflict in the Law or a Reason to Adopt Petitioners' Proposed New Rule of Law

The petition fails to illustrate a conflict in the law.

While petitioners cite cases that stand for basic propositions that due process requires a neutral and detached judge, they cite no case that actually conflicts with the ruling at issue here. This Court has held, to the contrary, that "most matters relating to judicial qualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (citing *Tumey*, *infra*). "[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). This Court has recognized that the due process "floor" is for "a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (citations omitted). The due process standard thus generally requires actual bias or an actual vested interest.

Here, petitioners do not contend that there is any actual bias or any interest in the outcome. They are left to argue only that there is a presumptive bias based upon the campaign contributions.

This Court has recognized "presumptive bias" as a basis to require recusal under the Due Process Clause only in three situations: "(1) when the judge 'has a direct personal, substantial, and pecuniary interest in the outcome of the case,' (2) when he 'has been the target of personal abuse or criticism from the party before him,' and (3) when he 'has the dual role of investigating and adjudicating disputes and complaints.'" *Richardson v. Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1355 (2009) (citations omitted). *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927) (mayor-judge, who imposed fine based upon convictions, derived compensation from the fine); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (judge was a plaintiff in bad faith suit against the insurance industry and ruling could impact on his private case); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (judge was verbally attacked by defendant and then presided over defendant's contempt trial). Our case falls within none of those categories where any appearance of impropriety (if there were any) would trigger a due process concern. An appearance of impropriety, as opposed to some actual bias, has never given rise to this Court finding a due process violation. *See Del Vecchio v. Ill. Dep't of Corrections*, 31 F.3d 1363, 1372, n.2 (7th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1037 (1995) (historical analysis "support[s] the position that the Supreme Court has never rested due process on appearance.").

Moreover, this Court has recognized that a Justice on this Court should not necessarily resolve doubts in favor of recusal because, by removing a Justice (if it results in an even number of justices deciding the matter), the Court faces the possibility of tie votes and

therefore an inability to resolve a significant legal issue. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915 (2004). The same reasoning applies to motions seeking recusal of State Supreme Court justices.

This order does not conflict with the controlling case law. To the contrary, the case law supports the order on review. This Court recognized in *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002), that "the Due Process Clause of the Fourteenth Amendment [ ] has coexisted with the election of judges ever since it was adopted." (internal citation omitted). *See also Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 310-11 (E.D. Pa. 1998) ("The receipt of campaign contributions does not present the type of 'extreme' case of bias required to implicate the federal constitution."). *Nigro* cited cases from the high courts of North Dakota, Alabama, Ohio, Florida and Texas holding that a "judge is not ethically, let alone constitutionally, required to recuse where a party is represented by an attorney who has contributed to or raised money for the judge's election campaign." *Id.*

This Court has also recognized that certain "biasing influence[s]" can be "too remote and insubstantial to violate the constitutional constraints." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986) (citations omitted). In *Aetna*, this Court rejected the suggestion that other justices on the Alabama Supreme Court should have been recused because they were also potential class members of the class action at issue. The Court acknowledged that such justices might have had a "slight pecuniary interest" in the case but held that such

interest was "highly speculative and contingent" and therefore did not raise any constitutional concern. *Id.* at 825-26.

Indeed, even the most vocal opponents to the concept of judicial campaign funding recognize that not all contributions rise to the level of due process violations. *See, e.g., Reimer*, "Inside NACDL," 33-MAR Champion 7, *8 (2009) ("NACDL [the Nat'l Ass'n of Criminal Defense Lawyers] does not . . . assert that . . . judicial campaign contributions . . . necessarily violate the Due Process Clause. Nevertheless, the Court must recognize that there comes a point where massive campaign support so obviously suggests impartiality as to require judicial disqualification.").

The petition fails to demonstrate a reason to adopt petitioners' proposed new rule of law.

Beyond failing to prove a conflict, plaintiffs cite no case that supports adopting their proposed "new rule." (Petition, p.27). The "new rule" they propose is

> "that an appellate judge as a matter of constitutional law should disqualify himself in a proceeding in which there is shown an objective 'probability of actual bias' or where his partiality might reasonably be questioned, including, but not limited to, instances where he has a close personal or professional relationship or a direct, personal or financial

> connection to a party appearing before him or in the outcome of the appeal."

(*Id.*). None of their cited cases adopt such a "rule" or provide a compelling, constitutional basis to adopt such a rule.

C. This Case is Not the Right Vehicle to Consider These Issues Because No Constitutional Impropriety Has Been Shown

As shown above, this case involves donations to campaign committees ranging from $250 to, at most, $11,500. All but seven of the 30 donations at issue were in the $250 to $2,500 range. Virtually all of the donations were made many years before the suit at issue was even filed and nearly a decade before the case wound its way up to the Illinois Supreme Court.

Whatever concerns might have been voiced in *Caperton v. A.T. Massey Coal Co., Inc.*, U.S. No. 08-22, do not exist here. However, *Caperton* is useful here because the briefs filed in that case offer some guidance as to why the current case is not one that should give this Court pause under any standard to be applied. Particularly instructive is an *amicus curiae* brief filed in *Caperton* by the Conference of Chief Justices ("the Conference"). It asserted that the following seven criteria should be used in evaluating whether due process requires recusal for campaign spending in a particular case: (a) size of the expenditure, (b) nature of the support, (c) timing of the support, (d) effectiveness of the support, (e) nature of the supporter's prior political activities, (f) nature of supporter's pre-existing

relationship with the judge, and (g) relationship between the supporter and the litigant. *See* Brief, 2009 WL 45973 *26-29 (U.S.). Using these criteria as a guide, it is clear that the present case does not raise the types of concerns that the judges themselves have raised as potential due process considerations.

(a) size of the expenditure

The Conference noted that any concerns that challenging an elective judge because of campaign support might open the floodgates for thousands of disqualification challenges was "unfounded" because "due process review of a challenged failure to recuse would be limited to cases of extraordinary support." 2009 WL 45973 at *23. Here, the amounts at issue are not only not "extraordinary," they are at best "ordinary" and are relatively insignificant. Certainly, they are not such extraordinary out-of-line contributions that it should raise the spectre of bias.

The contributions made to these justices totaled $1,500 to Burke, $16,000 to Thomas, $5,000 to Freeman, and $52,750 to Fitzgerald, comprising less than 1% to, 2.8%, to 3%, to at most, 5.9% (respectively) of the contributions made to these justices' campaign committees years ago. Given that plaintiffs claim that the defendant firm is "the most recognized and renowned plaintiffs' product liability law firm not only in Chicago and Illinois, but throughout the country," (Petition, p.12), these contributions cannot be characterized as extraordinary.

The amounts contributed by Joseph Power and Robert Clifford, defendants' legal experts in the underlying suit, should not be considered at all. This appeal involved the dismissal of certain counts of plaintiffs' complaint and summary judgment on other counts. No reference was made to either Power or Clifford in the Appellate Court's 42-page decision or in plaintiffs' 20-page Petition for Leave to Appeal. Their opinions were not the basis of either the trial court's rulings or the Appellate Court's affirmance. Those attorneys' relationships, whatever they are, with the Supreme Court justices is irrelevant in this case. On the face of the documents submitted to the Illinois Supreme Court to decide whether to grant leave to appeal, the court would not have known that either of these gentlemen were involved in this suit. Accordingly, their relationship to any of the judges and their campaign contributions should not even be considered. Also irrelevant and not worthy of consideration is the separate contributions that had been made to the campaign committee of a justice's spouse (Edward Burke).

(b) nature of the support

As to this factor, the Conference of Chief Justices explains that "the nature of the support, and its benefit to the candidate and his or her candidacy, must be considered." 2009 WL 45973 at *26. This factor also considers how the monies at issue are controlled and spent.

In Illinois, the Code of Judicial Conduct imposes guidelines that protect against impropriety. For example,

Illinois Supreme Court Rule 67 (B)(2) (which adopts the Model Code of Judicial Conduct Canon 4.1), specifically prohibits candidates for judicial election from personally soliciting or accepting campaign contributions. *See* Ill. Sup. Ct. R. 67(B)(2). There is no suggestion in this case that any contribution was made to or accepted by any of these justices that violated this Canon. The State of Illinois Judicial Ethics Commission has also recognized that the State's requirement that the identity of contributors (making contributions exceeding $150) be published, "places judges and their campaign contributors under public scrutiny, thus providing some assurance of judicial impartiality." Ill. Jud. Ethics Comm., Op. 93-11 (1993), 1993 WL 774478, *2.

As far as the "benefit" of the support, for Justice Burke, this was moot because her election was ultimately uncontested and much of the campaign contributions were returned. Justice Freeman's 2000 retention was uncontested (although he was required to win by a 60% "yes" vote). Justice Fitzgerald and Justice Thomas ran in contested elections.

(c) timing of the support

That defendants made some contributions to these four justices' campaigns is merely a historical fact. Emphasis should be on the word "historical." Most of the contributions took place in 1999 to 2000, nearly a decade before the November 2008 motion to recuse. Even if *past* contributions (as opposed to contemporaneous contributions) could have any potential to bias a judge to rule a certain way, based upon some debt of gratitude or other elusive theory, at

some point such "debt" must fade. A contribution made many, many years before the case at issue cannot be deemed to have any effect, or a sufficient effect, to constitute a due process concern.

(d) effectiveness of the support

The "support" given by the defendants was to the campaign committees for these justices.

(e) nature of the supporter's prior political activities

The Conference explains that

> "the supporter's record of campaign activity must be considered. If the supporter has habitually made large contributions to or made independent expenditures on behalf of many candidates in the past, the support for one jurist who may later happen to preside over a case in which the supporter was involved would raise less suspicion than if the support was novel or extraordinary."

2009 WL 45973 at *28.

Public information available on the ISBE website (which petitioners rely on as the exclusive source of their recusal facts), shows that Corboy & Demetrio and these partners routinely make contributions of comparable amounts to numerous different campaign committees. Thus, the fact that minor contributions were made to these four justices is neither novel, extraordinary, nor suspicious.

(f) nature of supporter's pre-existing relationship with the judge

The only "facts" provided in the motion to recuse (and they are unsubstantiated) regarding a past relationship between the defendants/supporters and these Justices is that Philip Corboy (who is a partner at the defendant firm but not an individually named defendant) "as special counsel to the Illinois Democratic Party, has for years hosted parties to which several members of the Illinois Supreme Court are frequent invitees." (App. 12a). The motion does not specify which of the "several members" of the court are invitees; how often is their "frequent" attendance; or how many years constitute the "for years" that Corboy has hosted such parties. To the extent that the motion provides any factual information, it shows nothing more than that Mr. Corboy, in a professional capacity, sometime in the past (presumably more than 15 years ago) hosted professional events that would have included numerous people, including at times one or more of the Justices of the Illinois Supreme Court. This does not establish any type of special relationship between Mr. Corboy and any Justice that should raise due process concerns.

(g) relationship between the supporter and the litigant

The only "supporter" who is a named party is Mr. Bingle. The other supporters are partners of the respondent law firm and are not individually named defendants in this suit. That, and the fact that this is a malpractice suit involving allegations against the defendants purely in their professional capacities, renders this factor benign.

Even if petitioners' unprecedented "rule" were recognized and even if violation of such a rule did rise to the level of a due process violation, this case would still not be an appropriate vehicle for consideration because the facts, as presented on this Record, fail to violate petitioners' homespun rule. They suggest that disqualification is required where

> "there is shown an objective 'probability of actual bias' or where [the judge's] partiality might reasonably be questioned, including, but not limited to, instances where he has a close personal or professional relationship or a direct, personal or financial connection to a party appearing before him or in the outcome of the appeal."

(Petition, p. 27). There has been no showing of a "probability of actual bias." Nor has there been a showing of any type of "close" relationship. To the extent that minor, past contributions to a justice's campaign committee could constitute a financial "connection" at all, it certainly is not "direct." Thus, even under petitioners' standard, this case fails to raise constitutional concerns.

Moreover, although petitioners assert that this petition raises "fundamental issues of due process" (Petition, p.21), they rely on nothing more than the same argument they advance as to why these justices should have recused themselves. The motion to recuse was properly denied. Regardless, petitioners' claim of error is not sufficient to establish that a failure to recuse rises to the level of a due process violation.

See, e.g., Richardson v. Quarterman, 537 F.3d 466, 474, n.4 (5th Cir. 2008) ("[g]enerally, the constitutional due process requirements regarding judicial impartiality are much narrower than the requirements found in recusal statutes and ethical canons."). "Thus, a violation of a state or federal statute for the failure to recuse a trial judge because certain circumstances may give rise to an appearance of bias on the part of the judge does not necessarily constitute a due process violation." *Id.* *See also U.S. v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003), *cert. denied*, 540 U.S. 1209 (2004) (because claim failed to "pass muster" under 28 U.S.C. § 455(a), which requires recusal when a judge's impartiality might reasonably be questioned, "it cannot survive the more rigorous standards required of a claim under the due process clause.").

D. This Court Should Not Grant Certiorari To Consider a Moot and Hypothetical Argument

Half of petitioners' argument is hypothetical, further warranting that this Court decline review. In section C, petitioners argue: "**If** petitioners' motion for recusal of the four Justices . . . **had been** successful, the court **would have** lacked a quorum . . . to conduct any further review . . . and because a clear majority of four votes out of seven is necessary to grant petitioners' Petition for Leave to appeal, **it would have** lacked the power to grant the petitioners' Petition for Leave to Appeal. . . ." (Petition, p. 29, emphasis added). But the point is that the motion to recuse was denied. Accordingly, the Illinois Supreme Court "dismiss[ed] as moot" that portion of petitioners' motion. There is no basis for this Court to consider, on certiorari review, the moot and dismissed portion of the motion.

Moreover, the petition indicates that on February 3, 2009, the Illinois State Senate's Executive Committee recommended to the Executive Subcommittee on Constitutional Amendments an amendment to Article VI, § 3 of the Illinois Constitution which would allow for temporary appointments to the Illinois Supreme Court when a sitting justice is recused. (Petition, p.16). Accordingly, the State is working through its own procedures to address this issue. It is premature and unnecessary for this Court to expend its limited resources in resolving how to address the issue of replacement judges in a case where there were no judges to replace and where the State is considering a change to its Constitution to deal with this issue.

E. There Is No Need For Exercise of this Court's Discretionary Review

The petition should be denied because it utterly fails to provide this Court with any compelling reason for it to exercise its discretionary and limited review powers to consider this case. There is no conflict between any case law identified. To the contrary, petitioners claim that "the Court made clear" the standards in the existing case law. (Petition, p.24). Petitioners cite *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) and simply discus how the law in that case should be applied to the purported facts of our case.

This Court has already considered the *Caperton* case. To the extent that this area of the law needs discussion, the Court already has the vehicle to make those pronouncements. Petitioners should not be allowed to use this Court's current interest in this area of the law as a platform to raise reconsideration of a motion that was properly denied. Because the order

from which petitioners seek review was both procedurally and substantively deficient on its face, the petitioners' cause lacks merits. This Court's resources should not be squandered on this case.

CONCLUSION

Wherefore, based upon the arguments and reasons above, the Writ which Petitioners seek should be summarily denied.

Respectfully submitted,

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Dated: May 28, 2009

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No. 08-1129

IN THE

Supreme Court of the United States

MILVERTHA PINNICK, GUARDIAN AND NEXT FRIEND OF MANNA PINNICK AND CORTLAND PINNICK, MINORS, AND JAMES BRADY, ADMINISTRATOR OF THE ESTATE OF MELISSA PINNICK, DECEASED, PETITIONERS

v.

CORBOY & DEMETRIO, P.C., A PROFESSIONAL CORPORATION, ROBERT J. BINGLE AND G. GRANT DIXON, III, INDIVIDUALLY AND AS AGENTS OF CORBOY & DEMETRIO, P.C.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLACEMENT SUPPLEMENTAL BRIEF

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INTRODUCTION.

This Supplemental Brief is filed in order to update the Court on events occurring since the filing of the petitioners' petition for certiorari in this Court on March 3, 2009.

STATEMENT OF THE CASE.

When petitioners appealed the rulings of the trial court against them to the Appellate Court for the First Judicial District of Illinois, that intermediate appellate court issued a modified order on October 20, 2008, affirming all of the trial court's rulings with minor revisions(App. 4). Pursuant to Illinois Supreme Court rule, petitioners instituted a Petition for Leave to Appeal to the Supreme Court of Illinois, challenging each of the rulings made by the Illinois intermediate appellate court(App. 3-4).

Incident thereto, on December 22, 2008, the Supreme Court of Illinois denied the petitioners' Motion for Recusal of the four Supreme Court Justices Pursuant to Supreme Court Rule 63(C) and dismissed as moot petitioners' Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional(App. 1-2). With none of its member Justices having recused himself or herself, the Illinois Supreme Court at the time of the filing of the petitioners' petition for certiorari in this Court on March 3, 2009, had yet to rule on petitioners' Petition for Leave to Appeal.

However, on March 25, 2009, the Illinois Supreme Court----with *none* of its Justices having

recused himself or herself from considering this appeal----denied petitioners' Petition for Leave to Appeal, leaving petitioners with no further appellate remedy in the State courts to have the entry of summary judgment against them reviewed or reversed(Supp. App. 1, *infra*).

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

SUPREME COURT OF ILLINOIS

WEDNESDAY, MARCH 25, 2009

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

.....

NO. 107359 - Milvertha Pinnick, etc. et al., petitioners v. Corboy & Demetrio, P.C., etc., et al., respondents. Leave to appeal, Appellate Court, First District. (1-07-0533)

Petition for leave to appeal denied.

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